Filed 3/26/12 P. v. Rodriguez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PERFECTO CORTEZ RODRIGUEZ, Defendant and Appellant.	B229327 (Los Angeles County Super. Ct. No. BA370063)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Affirmed.

Law Offices of Pamela J. Voich and Pamela J. Voich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Following a jury trial, appellant Perfecto Cortez Rodriguez was convicted of one count of attempted criminal threats (Pen. Code, §§ 664, 422)[1] and two counts of disobeying a domestic relations court order (§ 273.6, subd. (a)). The trial court suspended imposition of sentence and placed defendant on probation for five years, on the condition that he serve 472 days in county jail and complete a domestic violence counseling program. The trial court imposed various fines and court fees and appellant was awarded 236 days of actual custody credit and 236 days of conduct credit, for a total of 472 days of presentence credit.

Appellant contends that the evidence was insufficient to support the jury's finding that he attempted to make a criminal threat towards the victim. He also contends that the admission of gang evidence was unduly prejudicial. Appellant also seeks review of the trial court's in camera hearing pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

We affirm.

FACTS

Prosecution Evidence

While living with her partner, Miguel Gonzalez, Griselda Loza began dating appellant in November 2009. Loza ended the relationship in February 2010, because appellant was a "violent person." She obtained a restraining order against him on March 22, 2010.

On April 2, 2010, appellant came into the laundromat where Loza was washing clothes. Appellant forcibly kissed Loza three to four times and told her he wanted to continue the relationship. Loza told appellant not to kiss her and that she did not want to see him anymore. Appellant grabbed Loza and dragged her outside. He forced her into his truck and told her he wanted to have sex with her. Loza resisted and was scared that

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

he was going to rape her. She eventually forced her way out of the truck and went back inside the laundromat.

On April 8, 2010, at approximately 8:00 a.m. Loza was walking her three children to school when she saw appellant drive past in his truck. Appellant honked and waved at Loza. Appellant did not have any children attending the school which was about two blocks away. Loza saw appellant every day in the same location waiting for her. Appellant parked his truck about 40 feet from Loza. Loza called the police because she believed that appellant was trying to see her again. When she placed the 9-1-1 call she was nervous because appellant was a violent person.

The 9-1-1 call was classified as a domestic violence restraining order violation. Los Angeles Police Department Officers John Wills and Ben Ellis responded in a marked patrol car. They observed appellant park his truck and walk towards a street vendor. Officer Wills verified appellant's identification and placed him under arrest while Officer Ellis spoke with Loza. Appellant's eyebrows were sunken in, his face was turning red and he appeared angry and irate. As Officer Wills was placing appellant inside the patrol car, appellant stated, "Tell that bitch I'm going to fucking kill her. I'm only going to be in jail for six days. I'm not going to be in there forever. I'm Mexican Mafia. I can do stuff."

At trial, Loza testified that she was approximately 40 feet away from appellant as he was being arrested and she did not hear him say anything. She also testified that she feared appellant would rape her when he gets out of prison. Officer Wills testified at trial that the Mexican Mafia is a gang. He also testified that he did not communicate appellant's statement to Loza.

Defense Evidence

Neftali Rosales was a street vendor who sold fruit. He testified that appellant and Loza bought fruit from him and he regularly saw them hold hands and act like a couple. Loza told Rosales that she was breaking up with appellant because she was reuniting with her husband who had forgiven her. Loza asked Rosales to serve appellant with a

restraining order but then changed her mind and took it back. Rosales did not hear appellant honk his horn, nor did he see him wave to anyone before he parked his truck. By the time Rosales saw Loza the patrol cars had already arrived and Rosales said to himself, "she called the police on him." Rosales testified that he did not hear appellant say anything to the police officer as he was being arrested but acknowledged that he did not see appellant being placed in the patrol car.

Maria Rodriguez, appellant's sister-in-law, was also present on April 8, 2010, and witnessed appellant being arrested. She testified that Loza called her a few days after appellant's arrest. Loza told her that she could no longer see appellant because she had "gotten back together with her husband."

***Pitchess* Motion**

Appellant brought a *Pitchess* motion for discovery of citizen complaints and other evidence of misconduct contained in the personnel file and other confidential records of Officer Ellis. The trial court granted the motion, held an in camera hearing on July 6, 2010 and the defense received *Pitchess* compliance discovery. Appellant filed supplemental *Pitchess* motions and received additional information.

DISCUSSSION

I. Appellant's Attempted Criminal Threat Conviction

A. Contention

Appellant contends that the evidence was insufficient to support the jury's finding that he made a criminal threat as to Loza. He contends his statement upon arrest was simply an angry emotional outburst and he never intentionally attempted to make a threat that was communicated to Loza.

B. Relevant Authority

Section 422 provides in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an

electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety" is guilty of a crime.

When determining whether the trial evidence was sufficient to sustain a conviction, "our role on appeal is a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We review the entire record in the light most favorable to the judgment to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Ibid*.)

"[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Even when there is a significant amount of countervailing evidence, the testimony of a single witness can be sufficient to uphold a conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

So long as the circumstances reasonably justify the trier of fact's finding, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Reversal is not warranted unless it appears that "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt." (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

C. Sufficient Evidence Supported Appellant's Conviction

In *People v. Toledo* (2001) 26 Cal.4th 221, 227–228, the California Supreme Court explained: "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]"

Section 422 was enacted to punish those who try to instill fear in others. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913.) It does not punish "mere angry utterances or ranting soliloquies, however violent." (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 (*Teal*).) The circumstances under which the threat is made give meaning to the words used, and "threats are judged in their context." (*In re Rickey T.* (2001) 87 Cal.App.4th 1132, 1137.)

Here, the language employed by appellant and the circumstances surrounding the making of the statement to Officer Wills confirm a finding of an attempted criminal threat against Loza under section 422. Appellant realized that Loza had called the police and he was being arrested for violating a domestic violence restraining order. The threatening words were uttered in a voice loud enough for Officer Wills to hear, and Officer Wills testified that appellant was angry and irate and his face was turning red. The jury could reasonably infer that appellant intended Officer Wills to convey the message to Loza to prevent her from testifying against him. Although "[o]ne may, in

private, curse one's enemies, pummel pillows, and shout revenge for real or imagined wrongs—safe from section 422 sanction," appellant did not do so in private, but in front of Officer Wills who was charged with protecting the public. (*Teal, supra,* 61 Cal.App.4th at p. 281.)

Appellant's carefully chosen words underscored the seriousness of the threat. Appellant unequivocally and specifically stated that he was "going to fucking kill" Loza. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 752 [threatening death or great bodily injury is sufficiently specific].) Appellant placed no conditions on his threat. He stated that he would not be in jail forever and expected to be out after six days. The fact that the killing would occur after he got out of jail does not detract from the immediacy of the threat. A threat has been held to be immediate, even when the person making the threat was incarcerated. (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431–1432.)

The evidence also showed that Loza was in sustained fear for her safety and that fear was reasonable. The encounter which led to appellant's arrest on April 8, 2010, was not an isolated incident. Loza was afraid of appellant because she knew him to be a violent person during their relationship. Appellant had violated the restraining order on a prior occasion at the laundromat and physically restrained Loza. Appellant showed up every day at the same location where Loza would see him as she took her children to school. Appellant's threat to harm Loza was more consistent with the actions of a violent person than an isolated unintentional emotional outburst as appellant contends on appeal.

Appellant also contends that using Officer Wills to convey the threat to Loza was illogical and an "unconventional and odd means of communicating" a threat, and supports his contention that he did not possess the requisite state of mind at the time.

First, it is not relevant that appellant could not be absolutely certain his threat would be conveyed by Officer Wills. (*Teal, supra,* 61 Cal.App.4th at p. 281.) In *Teal,* the court held that the threatener need not be sure that his threat has been received by the threatened person. "As with murder, if one shoots with the intent to kill, it is murder whether or not the shooter knows his bullet has hit its mark. So too, if one broadcasts a

threat intending to induce sustained fear, section 422 is violated if the threat is received and induces sustained fear—whether or not the threatener knows his threat has hit its mark." (*Ibid.*)

Second, as applicable to the circumstances here, section 422 requires that the perpetrator intend that the threat be delivered to its target. "[W]here the accused did not personally communicate a threat to the victim, it must be shown that he specifically intended that the threat be conveyed to the victim." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861; *People v. Felix, supra,* 92 Cal.App.4th at p. 913.) Here, appellant clearly intended that the threat be delivered because he told Officer Wills to "tell that bitch." We are satisfied that voicing a threat of killing someone to police officers, evidences appellant's intention that the threat be communicated to the victim and that the threat be taken seriously. The specific intent to actually carry out the threat was not required, and the fact that Officer Wills did not convey the threat to Loza was a fortuitous circumstance but did not negate appellant's specific intent to threaten Loza. (*People v. Butler, supra*, 85 Cal.App.4th at p. 759.)

II. Gang Evidence to Prove Appellant's Intent Was Properly Admitted

A. Contentions

Appellant contends the trial court prejudicially abused its discretion by permitting the prosecution to introduce gang evidence in the form of testimony from Officer Wills. Specifically appellant contends that Officer Wills should not have been permitted to testify: (1) that a portion of the threat against Loza included a statement by appellant that, "I'm Mexican Mafia"; and (2) that the Mexican Mafia is a gang.

Respondent claims the gang evidence was relevant to the issue of appellant's intent to make Loza aware of the seriousness and immediate nature of the threat.

B. Background

Prior to trial, appellant moved to exclude any reference to the Mexican Mafia on the grounds that it was irrelevant and unduly prejudicial under Evidence Code

section 352. The trial court permitted appellant's statement in its entirety but did not allow any testimony regarding the activities of the Mexican Mafia. At trial, the prosecution asked Officer Wills if the Mexican Mafia was a gang, to which Officer Wills responded, "Yes, Ma'am." The jury received a limiting instruction, stipulated to by the parties, specifically related to the admission of the gang evidence as follows: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other. Officer Wills attributed to the defendant an oral statement that the defendant was a member of the Mexican Mafia. There is no evidence that the defendant is a member of the Mexican Mafia gang. You are to consider this evidence only for the limited purpose of determining whether the defendant had the required specific intent for an attempted criminal threat."

C. Relevant Authority

Despite its potential for prejudice, "evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Gang evidence may be relevant to establish the defendant's intent concerning the charged offenses. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.)

A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) "The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. [Citation.]" (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*People v. Albarran, supra,* 149 Cal.App.4th at p. 225.)

D. Analysis

Appellant's intent to convey the seriousness of the threat and his readiness to carry it out were contested issues in this case and therefore the precise language including the

limited reference to the Mexican Mafia was relevant. The People were required to prove under section 422 that appellant's threat conveyed to the person threatened "a gravity of purpose and an immediate prospect of execution of the threat." Appellant knew he was going to jail but wanted to make Loza aware that it would not impede his ability to carry out his threat to kill her. His statement that he could "do stuff" because he was a member of the Mexican Mafia was intended to convey to Loza that she was not safe even while he was in prison. The challenged statement, "I'm Mexican Mafia. I can do stuff," was more relevant because it was not third party testimony about a possible gang connection, but appellant's own words demonstrating his alleged connection to the Mexican Mafia. (See *People v. Champion* (1995) 9 Cal.4th 879, 919–921; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1373.)

Although gang membership evidence carried the potential for prejudice, we believe the probative value here substantially outweighed the possibility of prejudice. Having correctly established the relevance and importance of appellant's actual statement the trial court severely limited the scope of the evidence related to the Mexican Mafia to the extent that Officer Wills testified only that it was a "gang." Section 352 of the Evidence Code attempts to avoid the prejudging of a case based on extraneous facts. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The evidence of appellant's claimed affiliation with the Mexican Mafia was relevant to the seriousness of his threat and was not extraneous to the People's case.

This case is distinguishable from the decision in *People v. Albarran*, *supra*, 149 Cal.App.4th 214. There, the defendant argued that the trial court's admission of gang evidence violated the rules of evidence, prejudiced the verdict under state law, and violated his federal constitutional rights to due process, resulting in an unfair trial. (*Id.* at pp. 217, 221–223, 228–229.) The Court of Appeal concluded that references to the Mexican Mafia had little or no bearing on the material issues of guilt, and the wholesale use of such evidence was "overkill." (*Id.* at p. 228.)

Unlike the instant case, the gang evidence in *Albarran* was highly inflammatory. It contained references to the defendant's gang as "dangerous," to the defendant's tattoo linking him to the Mexican Mafia, and to the gang's graffiti that contained specific threats to murder police officers. The gang expert spoke of a number of the defendant's fellow gang members and their arrests and criminal offenses, which were unrelated to the charged crime. (*People v. Albarran, supra,* 149 Cal.App.4th at pp. 220–221.)

Here, in contrast, the trial court exercised its discretion by limiting the prosecution to explaining in the briefest manner possible that the Mexican Mafia is "a gang," and not permitting the prosecution to present any evidence of appellant's claimed affiliation with the Mexican Mafia, or any explanation of the activities of the gang. The trial court's decision ensured that no marginally relevant or inflammatory gang evidence created a substantial risk of the misuse of such evidence as bad character evidence. (*People v. Albarran*, *supra,* 149 Cal.App.4th at pp. 227–228.) Further, it is presumed that the jurors understood and followed the limiting instruction that they were not to assume or believe that the evidence proved that appellant was a member of the Mexican Mafia, but that the evidence was only to be considered as to his specific intent as to the attempted criminal threat. (*People v. Gray* (2005) 37 Cal.4th 168, 231.)

III. The *Pitchess* Motion

Appellant also requests that we independently review the sealed transcript of the in camera proceedings on his *Pitchess* motion, which we have done. The trial court's findings during that review, as reflected in the sealed transcript, were sufficient to permit appellate review of its ruling. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229, 1232.) We find no error in the trial court's ruling at the in camera hearing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ